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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-510

FLINT RIDGE DEVELOPMENT COMPANY,
Petitioner,

v.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA AND THE ILLINOIS RIVER CONSERVATION COUNCIL,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents in their Opposition attempt to divert the Court's attention from the important issues raised by Flint Ridge and the Solicitor General by throwing up a smoke-screen consisting of, *inter alia*, (a) the unexplained assertion that the District Court order

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*The Solicitor General of the United States has also petitioned for a writ of certiorari (No. 75-545) on behalf of the Secretary of Housing and Urban Development (HUD) to review the judgment and opinion of the Tenth Circuit in this case.

appealed to the Tenth Circuit by Flint Ridge does not exist thus leaving the Court without jurisdiction, (b) the repeated comingling of the National Environmental Policy Act (NEPA) as a whole with the only subsection of NEPA at issue here – concerning written environmental impact statements – and (c) an emotional argument on alleged environmental effects which conveniently ignores both the State of Oklahoma's authority over land use and the complete lack of any such authority by HUD under the Interstate Land Sales Full Disclosure Act (ILSA).

1. Respondents assert without further explanation (Opp. pp. 1-2) that the Court lacks jurisdiction on the grounds that Flint Ridge's Notice of Appeal to the Tenth Circuit designated an order of the District Court that does not exist. That order exists. It is reprinted in the appendices of the petitions for certiorari of both Flint Ridge (App. B, p. 13b) and the Solicitor General (App. C, p. 31a). The Tenth Circuit summarily denied respondents' motion to dismiss the appeal on what appears to be the same ground.[1]

2. Respondents attempt to mask the issues in this case by repeating the refrain: NEPA applies to HUD. No one disputes that general rule. This case, however,

[1]To the extent respondents' naked assertion can somehow be construed as suggesting that Flint Ridge's Notice of Appeal, quoted in respondents' Opposition at p.2, was in some way inadequate, we point out that as required by Rule 3(c) of the Federal Rules of Appellate Procedure, the Notice (1) specifies that Flint Ridge is the party taking the appeal, (2) designates the order appealed from by description and date, and (3) names the Tenth Circuit as the court to which the appeal is taken.

involves the question of whether HUD's checking and requiring correction of a statement of record *triggers* the written environmental impact statement requirement of section 102(2)(C) of NEPA (42 U.S.C. § 4332(2)(C)). That requirement is triggered only when a Federal agency undertakes "major Federal actions significantly affecting the . . . environment."[2] Although NEPA as a whole applies to all Federal agencies, "*major Federal* action" is a threshold that must be met before a written environmental impact statement is required.[3] Thus, Federal agencies can issue rules for compliance with NEPA without undertaking to prepare an environmental impact statement for every agency action. *See, e.g., NRDC v. SEC*, 389 F.Supp. 689 (D. D.C. 1974).

3. Respondents suggest that the issues in the present case were decided in *NRDC v. SEC*, 389 F.Supp. 689 (D. D.C. 1974) and subtly suggest that the SEC's failure to appeal that decision renders it dispositive of the

[2]The distinction between the applicability of NEPA as a whole and the specific written environmental impact statement requirement in section 102(2)(C) of NEPA has been previously recognized by the Court:

> "NEPA does create a discreet procedural obligation on government agencies to give *written* consideration of environmental issues *in connection with certain major federal actions*. . . ."
>
> Aberdeen and Rockfish R.R. Co. v. S.C.R.A.P., ____ U.S. ____ (1975) (SCRAP II), 43 U.S.L.W. 4844, 4853 (U.S. June 24, 1975) (Emphasis supplied).

[3]Council on Environmental Quality, Guidelines for Preparation of Environmental Impact Statements, 40 C.F.R. § 1500.6(c).

issues in this case because ILSA is patterned after the Securities Act of 1933. Respondents fail to point out, however, that the environmental impact statement requirement at issue in the instant case was not even present in *NRDC v. SEC.* Indeed, NRDC petitioned for a rulemaking to require disclosure of environmental information by *companies* filing with the SEC – not preparation by the SEC of an environmental impact statement on each filing. The district court had no occasion to address the environmental impact statement requirement of NEPA and held only that "[t]he SEC failed to comply with the *procedural requirements* of the APA [Administrative Procedure Act] in adopting rules which fulfill NEPA . . . ." *Id.* at 702 (Emphasis supplied). No petition for such a rulemaking has ever been filed by respondent Scenic Rivers. Moreover, as the Solicitor General states in his petition (p. 14), the SEC has advised him that it believes the Court should grant the writ because of the decision's possible effect on securities regulation. Because ILSA was patterned after the Securities Act of 1933, the Tenth Circuit decision is direct precedent for requiring the SEC to suspend securities registration statements until it prepares environmental impact statements.

4. Throughout their Opposition, respondents imply that HUD takes action under ILSA that *permits private parties* to engage in activities that affect the environment. HUD's authority, however, is limited to checking and requiring correction within the four corners of an antifraud disclosure document and to preventing fraudulent sales practices. Respondents do not and cannot cite any provision of ILSA empowering HUD to participate in the development's planning, financing or

construction or to authorize, permit, or approve the development. It is undisputed in this case that the site selection, financing, planning, and construction of utilities, roads, and other common improvements in the development began long prior to Flint Ridge's filing of its statement of record with HUD [R 533] and has continued uninterrupted. Consequently, any activities of Flint Ridge that affect the environment occurred *prior to and entirely independent of any HUD action* and are not subject to any subsequent permission or approval by HUD. Therefore, there was clearly no *Federal* action by HUD that permitted or could have prevented an effect on the environment. This underscores the significance of the issue presented to the Court: whether "major Federal action[ ] . . . affecting the . . . environment" really means "*any* Federal action."

5. Notwithstanding this complete absence of any *Federal* action that affects the environment, respondents attempt both to paint a horror story of "total destruction" of the entire Illinois River Basin and then to merge this purported environmental impact with HUD's limited authority to check and require corrections within the four corners of an antifraud disclosure statement.

Although maintaining that the private activities of Flint Ridge that may affect the environment do not constitute "*Federal* action" and were thus irrelevant to the issues in this case, Flint Ridge also vigorously disputed that septic tanks in the development will discharge sewage into the Illinois River and thus destroy the entire River Basin. The only conceivable basis for the finding was the nonexpert opinion testimony of Scenic Rivers' witnesses Jerry Overton and Thomas Aley. Overton, a graduate student in geography, offered

his opinion, based on a study he made of the Illinois River Basin, that effluent from septic tanks at the Flint Ridge Development would flow into tributaries and in some cases into the Illinois River almost as primary sewage [R 59]. On cross-examination, however, Overton admitted that his study did not even include a determination of the type of soil found in Delaware County in which the Flint Ridge Development is located [R 88]. Aley, a hydrologist, testified to the same effect on the basis of an experimental test he conducted on one septic tank located in Doniphan, Missouri, approximately 250 miles from Flint Ridge, where according to Aley the soil conditions were greatly similar [R 263-264]. On cross-examination, Aley admitted that although he had read some unidentified soil reports he did not conduct any soil analysis in the Flint Ridge area [R 264] and made no inquiry as to the type of septic tanks to be used [R 265]. This testimony piles presumption upon presumption to reach the dizzying heights of pure speculation.

The Oklahoma State Department of Health regulates septic tanks and has authority to prohibit pollution therefrom. 63 Okl. Stat. Ann. §§ 1-909 & 1-910. The Commissioner and two registered professional sanitarians of the Department testified that the use of septic tanks in the Flint Ridge Development *was approved and would not pollute the Illinois River* on the basis of percolation tests of the land in the development [R 442-443, 451-455]. A registered professional engineer testified on the basis of percolation tests and six 90 to 100 feet soil boring cores that neither raw sewage nor effluent will ever flow into the Illinois River from the septic tanks to be installed at the Flint Ridge Development [R 491-496].

6. Respondents give the misleading impression in their Oppositions to both Flint Ridge's and the Solicitor General's petitions that HUD has failed to follow its own regulations. Those regulations are clearly inapplicable to filings under ILSA. The letter from George K. Bernstein, Interstate Land Sales Administrator at HUD, which is appended to *respondents'* Opposition (App. A, p.1a), states: "[d]isclosure filings required by the Interstate Land Sales Full Disclosure Act are not considered federal actions for purposes of compliance with the National Environmental Policy Act and implementing regulations." Moreover, respondents raised this same argument in the Tenth Circuit and it was apparently not deemed to be of sufficient substance to even warrant mention in the court's opinion.

7. Respondents try to sidestep the conflict in principle between the decision of the Tenth Circuit and the holding in *United States v. S.C.R.A.P.*, 412 U.S. 669 (1973) (SCRAP I). SCRAP I held that NEPA does not *sub silentio* amend or repeal *by implication* any other statute. Respondents, however, state:

> "Only where an agency would have to *disobey a specific statutory command* in order to apply NEPA would the latter statute give way."
>
> (Opp. p. 13) (Emphasis supplied).

We agree that this argument is an accurate restatement of the effect of the Tenth Circuit's decision. It clearly shows the conflict in principle between that decision and SCRAP I. Even under this extreme standard, however, the environmental impact statement requirement of NEPA would have to give way to the operation of ILSA. Section 1706(a) of ILSA provides that a statement of record filed by a developer automatically

becomes "effective" 30 days after filing.[4] Under section 1706(b), HUD is empowered to suspend the effective date of a statement of record *only* if it appears to HUD to be ". . .on its face incomplete or inaccurate in any material respect. . . ." HUD is required by the Tenth Circuit decision, however, to flatly *disobey* sections 1706(a) & (b) and suspend the automatic effective date of a statement of record that is *not* on its face incomplete or inaccurate in any material respect. *A fortiori*, the decision of the Tenth Circuit amends *sub silentio* or repeals by implication sections 1706(a) & (b) and thus conflicts in principle with the holding in *SCRAP I*.

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[4] Respondents' attempt to imply that the 30-day effective date is *not* automatic when they say: "[U]nder § 1706(a) of ILSA the Statement of Record becomes effective 30 days after filing *but the Secretary is required to give due regard to protection of purchasers and the public interest in determining the actual effective date*." (Opp. p. 15) (Emphasis supplied). Section 1706(a), however, provides that "... the effective date of a statement of record... *shall be* the thirtieth day after filing thereof *or such earlier date as the Secretary may determine, having due regard to* the public interest and the protection of purchasers." (Emphasis supplied).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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